BEFORE THE

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

DEPARTMENT OF INDUSTRIAL RELATIONS

STATE OF CALIFORNIA

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| In the Matter of the Appeal of:<br><br>**THE ENVIRONMENTAL GROUP (TEG, The Environmental Group, Inc. )**<br>4710 S. Eastern Avenue<br>Commerce, CA 90040<br><br>Employer | DOCKET 96-R1D3-1633<br><br>**DECISION** |

## Background andJurisdictional Information

Employer is a construction contractor. Between November 28, 1995 and April 30, 1996, the Division of Occupational Safety and Health (Division), through Brian Brooks, conducted an accident inspection at a place of employment maintained by Employer at 1900 Alameda De las Pulgas, San Mateo, California (the site). On May 3, 1996, the Division cited Employer for the following alleged violation of the occupational safety and health standards and orders found in Title 8, California Code of Regulations[1]:

| Citation | Item | Section | Type | Penalty |
|---|---|---|---|---|
| 1 | 1 | 1632(e) [Guarding Roof Openings] | General | $75 |

Employer has filed timely appeal contesting the existence of the violation.

This matter was presented for hearing before James Wolpman, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at San Mateo, California, on February 26, 1997 at 9:30 a.m. Employer was represented by Frank Garrett, Vice-President. The Division was represented by Brian Brooks, Safety Engineer. Oral

[1] Unless otherwise specified, all references are to sections of Title 8, California Code of Regulations.

and documentary evidence was introduced by the parties and the matter was submitted on February 26, 1997.

## Law and Motion

At the opening of the hearing, Employer indicated that its full corporate name is TEG, The Environmental Group, Inc. The caption of these proceedings is therefore amended to reflect its correct name and status.

## Docket No. 96-R1D3-1633

Citation 1, General, § 1632(e)

## Summary of Evidence

Employer was engaged in removing asbestos and PCPs from an office building. As a result of an accident in which employee Felix Velez was seriously injured, it was cited for failing to guard a skylight opening.

The Division offered evidence to establish that Velez climbed through an open second floor window to place a piece of plastic on the roof-like canopy over the front entrance to the building. In doing so, he fell 12' through an unguarded skylight to the floor below. In addition, it sought to establish that other employees working on a swing stage scafflold lowered from the roof of the builing were likewise exposed to the unguarded skylight as they entered or left the scaffold while it was resting on the canopy.

Employer offered evidence to establish that the window through which Velez climbed was boarded up and posted with yellow "Caution" tape, that his job assignment at the time confined him to the first floor, and he had been warned to stay off the canopy. In taking it upon himself to climb out onto the canopy after removing the plywood guard covering the 2nd floor window, Velez ignored his job assignment and knowingly disregarded an established safety rule which was part of Employer's well devised and actively enforced safety program.

As for employees who were on the scaffold while it was resting on the canopy, Employer presented evidence that its guard rails protected them from the skylight. There was no exposure as they entered or left the scaffold because, when that was necessary, it was positioned at the edge of the canopy with direct ladder access to the ground below.

## Findings and Reasons for Decision

**ALTHOUGH MUCH OF THE EVIDENCE WAS HEARSAY IN NATURE, THE DIVISION PRESENTED SUFFICIENT RELIABLE EVIDENCE TO ESTABLISH A PRIMA FACIE CASE FOR A VIOLATION OF THE REQUIREMENT THAT SKYLIGHTS BE PROTECTED.**

**THAT THE WINDOW LEADING TO THE UNPROTECTED SKYLIGHT WAS COVERED AND POSTED WITH "CAUTION" TAPE IS NOT ENOUGH TO ESTABLISH A DEFENSE. THE SAME IS TRUE OF THE HEARSAY EVIDENCE THAT EMPLOYEES WERE TOLD TO STAY AWAY FROM THE AREA.**

**NOR DID EMPLOYER MEET THE REQUIREMENTS TO ESTABLISH THE INDEPENDENT EMPLOYEE ACTION DEFENSE BASED ON A FORESEEABILITY ANALYSIS.**

**A VIOLATION IS FOUND AND A PENALTY OF $75 IS ASSESSED.**

This is one of those unfortunate cases where so much of the evidence rests on hearsay that the outcome is determined more by the few findings which can legitimately be made than by the facts which might well have emerged if reliable evidence had been presented.

The photographs establish that the entrance to the building is covered by a roof like canopy extending out from the first floor. A row of skylights extend across the canopy just outside the windows on the second floor. A photograph of the outside of the building taken a week before the accident shows that the glass on one of those windows had been replaced with a plywood covering. A photograph from inside, taken shortly after the accident, shows the plywood covering in place, with two rows of yellow "Caution" tape across it.

The parties agree that Velez was an employee and that he was injured when he climbed out the window and fell through the skylight

immediately beneath the sill. They also agree that the skylight had no railing or cover.

Neither the injured employee nor the two on-site supervisors testified. Instead, the Division presented Velez' hearsay statement that the window was uncovered when he climbed through (Exhibit 9), and Employer relied on hearsay statements by the project manager that the plywood was in place and covered with caution tape (Exhibits 7 & 11).

Velez' statement also indicates that he was acting on instructions from his foreman to go out on the canopy and spread a plastic sheet to catch rubbish thrown from the scaffold above. The foreman's hearsay statement admits that Velez was on the canopy to spread the plastic sheet, but is silent on whether he had been told to go there. (Exhibit 8.) The project manager's hearsay statement to the inspector says that Velez' reason for being on the roof was "unknown" (Exhibit 11); his subsequent statement says employees had been told to stay off the canopy and that Velez was assigned to work on the first floor and had no business being on the roof. (Exhibit 7.)

§ 376.2 provides that:

> "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

When that rule is applied to the evidence presented, few findings are possible.

The statement of the foreman that Velez was going to put a piece of plastic on the roof can be the basis for a finding because it would have been admissible in a civil action under the hearsay exception for authorized admissions. (Evid. Code § 1222.) It, together with Velez' supporting hearsay statement to the same effect, justifies a finding that that was his purpose.

While there is no non-hearsay evidence to establish that he was acting on instructions from his foreman, the lack of such evidence is not despositive. In the leading case of ***Nicholson-Brown, Inc.***, OSHAB 77-024, Decision After Reconsideration (Dec. 20, 1979), the Board stated that fall protection safety orders are applicable whenever employees are "within the zone of danger while performing work related duties, ***pursuing personal activities during work***, or employing normal means of ingress and egress to their work stations." (***Emphasis supplied***.) That he may have

been acting on his own initiative, without authorization, is therefore no defense.

That being so, the Division has established a ***prima facie*** case for the violation of the requirement, found in § 1623(e), that skylight openings be guarded by fixed railings or a cover whenever there is a danger of falling through.

By way of defense, Employer points out that the window through which Velez climbed was covered and posted.

The "before" and "after" photographs are a sufficient to justify the inference that he had to remove the plywood to get onto the roof, his hearsay denial notwithstanding. The evidence that "caution" tape was posted is weaker since it appears only in the post-accident photograph, but the project manager's hearsay statement that the tape was in place can be used to supplement the photograph and justify such a finding.

But those two findings are not enough to establish a defense. The existence of a plywood cover over the window does not prove that entry was forbidden. It could just have easily have been erected for protection against the elements or to indicate caution rather than exclusion. Indeed, the yellow tape counseled just that: “Caution”. Moreover, blocking the window was no substitute for guarding the skylight as required by the safety order. (Cf. ***Tobin Steel Company, Inc.***, OSHAB 83-952, Decision After Reconsideration (Apr. 30, 1986) [belt and pulley guard used by employer fell short of that required by safety order].)

Next, Employer contends that it should be excused from liability because Velez and the rest of his crew had been told, shortly before the accident, that they were not to access the 2nd floor without authorization and because, on the day of the accident, no one was allowed on the canopy roof. (Exhibit 7.)

The assertion that employees were instructed not to go to the 2nd floor and warned to stay off the canopy is based entirely on hearsay evidence which would have been inadmissible over objection in a civil proceeding. As such, it cannot not support a finding that Velez had been forbidden to go out on the canopy.

In any event, admonitions, instructions and warnings are no substitute for proper guarding. (***Bethelem Steel Corporation***, OSHAB 78-723, Decision After Reconsideration (Aug. 18, 1984).)

Finally, Employer argues that it should be excused because it was not foreseeable that Velez would enter the zone of danger.

When confronted with a similar argument in ***Napa Pipe Corporation***, OSHAB 90-143, Decision After Reconsideration (Apr. 18, 1991), the Board first pointed out that "foreseeability" relates to the ***classification*** of the violation as serious, not to its ***existence***. Since the instant violation was charged as general, foreseeability does not come into play.

The Board in ***Napa Pipe*** then went on to indicate that foreseeability has also been invoked by several courts as an alternative analysis to the independent employee action defense. Instead of the five factor test announced in ***Mercury Service, Inc.***, OSHAB 77-1133, Decision After Reconsideration (Oct. 16, 1980), the alternative test provides that "...the violation is deemed unforeseeable, therefore not punishable," if the employer can show: (1) that it did not know and could not have known of the potential danger to employees; (2) that it exercised supervision adequate to assure safety; (3) that it acted to ensure employee compliance with its safety rules; and (4) that the violation was unforeseeable. (***Gaehwiler v. OSHAB***(1983) 141 Cal.App.3d 1041, 1045; ***Newbery Electric Corp. v. OSHAB*** (1981) 123 Cal.App.3d 641, 649; ***Davey Tree Surgery Co. v. OSHAB*** (1885) 167 Cal.App.3d 1232, 1239.)

It is unclear whether the Board, in ***Napa Pipe***, accepted or merely acknowledged the existence of that alternative analysis.[2] But even under that analysis, the evidence does not support a finding of independent employee action. The blocking and posting of the window indicates an awareness of the potential danger. The evidence that Employer exercised adequate supervision and acted to ensure compliance with its safety rules cannot support a finding because it is hearsay inadmissible in a civil proceeding.[3] Likewise, the unforeseeability of Velez' conduct can only be determined by reference to the hearsay statements of his superiors.

The Division has therefore established a general violation of § 1632(e) arising out of Velez exposure to the unprotected skylight. Not so, however, with its claim that employees entering and leaving the swing stage scaffold were similarly exposed.

While the inspector did not personally observe that alleged violation, he testified that the project manager told him that the swing stage had been used to perform work above the canopy on the day before the accident and that, on the day of the accident, it was resting, unused,

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[2] Earlier, in ***Stone Container Corporation***, OSHAB 89-042, Decision After Reconsideration (Mar. 9, 1990), the Board appeared to have acceded to the analysis.

[3] For those same reasons, and others as well, Employer would fail the traditional ***Mercury Services*** test.

atop the canopy. (Exhibit 11.) Since the controls used to lower the scaffold are located on the scaffold itself (Exhibit A), the inspector inferred that the employees who had used it could only have exited by climbing from the scaffold onto the canopy and then down to the ground or through the 2nd floor window. As they did, they too would have been exposed to the row of unprotected skylights extending across the canopy.

Although the statements made by the project manager fall within the exception to the hearsay rule for authorized admissions and hence could support a finding of employee exposure, no such finding can be made in the face of evidence offered by Employer that when exit was anticipated care was taken to ensure that the scaffold was attached to those hooks on the roof above which would allow it to be lowered so that its edge would be flush with the edge of the canopy. Employees could then move directly from the scaffold with its guardrails to an adjacent ladder and climb down without exposure to the unprotected skylights.

Employer's account offers a reasonable and innocent explanation which is fully consistent with the statements made by the project manager and is uncontradicted by other evidence. That being so, no inference of employee exposure is justified.

The reasonableness of the proposed $75 penalty for the violation which did occur was not appealed and is therefore affirmed.

DATED: March 27, 1997

JAMES WOLPMAN
Administrative Law Judge